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No. 94-438

In The

Supreme Court of the United States

October Term, 1994

JOHN C. ELLINGSWORTH, Warden, Sussex Correctional Institution, and CHARLES M. OBERLY, III, Attorney General of the State of Delaware,

Petitioners,

v.

GEORGE L. REYNOLDS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHARLES M. OBERLY, III
Attorney General of the State of Delaware

RICHARD E. FAIRBANKS, JR.
Chief of Appeals Division

LOREN C. MEYERS
Deputy Attorney General
Counsel of Record

Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 577-2500

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This Court should grant review in this case to reconcile two themes in its criminal jurisprudence, the requirement that a state procedural bar be adequate in order to bar federal review and the refusal of the federal courts to consider claims intentionally abandoned by defense counsel. Respondent offers no theory for doing so, preferring to expose the States to the risk of being required to answer a constitutional claim that had been intentionally abandoned years earlier. Under the decisions of this Court, however, that exposure is unwarranted.

REASONS FOR GRANTING THE WRIT

1. This Case Presents an Important Question Regarding Federal Habeas Jurisprudence.

Petitioners and respondent agree that this Court has generally put to rest the deliberate bypass standard of *Fay v. Noia*, 372 U.S. 391 (1963). Pet. for Cert. at 17; Brf. in Opp. at 6. With that, respondent would simply have the dispute end. However, respondent's theory does not account for the equally clear statements by this Court that a claim intentionally withheld from the state courts for strategic reasons cannot be raised in federal habeas corpus. *See Smith v. Murray*, 477 U.S. 527, 534-36 (1986); *Reed v. Ross*, 468 U.S. 1, 13-14 (1984); *Wainwright v. Sykes*, 433 U.S. 72, 96 (Stevens, J., concurring) (1977); *id.* at 98-99 (White, J., concurring in judgment); *id.* at 101-02 & n.4 (Brennan, J., dissenting). *Cf. Johnson v. United States*, 318 U.S. 189, 200-01 (1943) (direct appeal; no plain error). This case enables the Court to decide if a defendant can take advantage of an error that, for strategic reasons, he intentionally chose not to challenge. The deliberate bypass doctrine announced in *Fay* ensures that even if there is no state procedural rule adequate to bar federal habeas review under *Sykes* and *Coleman v. Thompson*, 501 U.S. 722 (1991), a defendant will not be able to gain such an advantage.

2. A Deliberate Bypass of the Opportunity to Object Is an Adequate Ground to Bar Federal Habeas Relief.

The state courts and the federal district court have held that respondent had chosen not to present his due process claim to the trial court or state supreme court on

appeal because of intentional strategic decisions. Respondent nonetheless urges that the decision of the court of appeals is correct, offering two reasons why these findings of deliberate bypass were irrelevant. First, he suggests that examining counsel's tactical motivations is permissible only if there is a state procedural rule. Brf. in Opp. at 4, 7. That reasoning is hard to reconcile with this Court's action in *Henry v. Mississippi*, 379 U.S. 443 (1965). There, this Court suggested that the state procedural rule was inadequate, but the Court nevertheless remanded the matter for exploration of counsel's tactical motivations, holding that federal review would still be unavailable if counsel, for strategic reasons, had not exercised the opportunity to raise the claim earlier. Indeed, the Court seemingly drew a line between a forfeiture analysis under the independent and adequate state ground doctrine and the deliberate bypass doctrine, *Henry*, 379 U.S. at 448 n.3, a line that the Court again pointed out in *Sykes*, 433 U.S. at 83 n.8. Respondent's rationale is also contrary to *Kaufman v. United States*, 394 U.S. 217 (1969), holding that a federal prisoner could be denied post-conviction relief if he "deliberately bypassed the orderly federal procedures provided at or before trial and by way of appeal – e.g., motion to suppress under Fed. Rule Crim. Proc. 41(e) or appeal under Fed. Rule App. Proc. 4(b)." 394 U.S. at 227 n.8. That power existed even though neither of the procedural rules cited nor 28 U.S.C. §2255 itself contained any express declaration that the failure to file a suppression motion or pursue the issue on appeal

would preclude further review. *See Davis v. United States*, 411 U.S. 233, 239-40 (1973).[1]

Secondly, respondent argues that because he was not personally involved in or consulted about the decision, the deliberate bypass doctrine, if it still exists, is not applicable. Brf. in Opp. at 4, 7-8. This rationale is inconsistent with the deliberate bypass standard as the lower federal courts applied it. As Justice Stevens noted in his concurrence in *Sykes*, "The suggestion in *Fay*, 372 U.S., at 439, that the decision must be made personally by the defendant has not fared well, although a decision by counsel may not be binding if made over the objection of the defendant." 433 U.S. at 94 n.1 (Stevens, J., concurring) (citations omitted).[2]

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[1] Indeed, the rationale of the court of appeals and respondent is inconsistent with a line of Seventh Circuit cases which have held that a federal defendant's failure to raise a claim on direct appeal bars collateral review under *Sykes*. In doing so, the Seventh Circuit rejected the notion that *Sykes* does not apply to such failures because the relevant procedural rule, Fed. R. App. Pro. 4, does not contain a forfeiture provision. *United States v. Kovic*, 830 F.2d 680, 683-84 (7th Cir. 1987); *Williams v. United States*, 805 F.2d 1301, 1304-06 (7th Cir. 1986); *United States v. Griffin*, 765 F.2d 677, 679-80 (7th Cir. 1985); *Norris v. United States*, 687 F.2d 899, 902 (7th Cir. 1982).

[2] Respondent's contention otherwise is misdirected. As the district judge noted in her opinion, circuit precedent did not require respondent's participation in the decision, which was a trial issue. Pet. App. at 69 n.8 (quoting *United States ex rel. Green v. Rundle*, 452 F.2d 232, 236 (3d Cir. 1971)). *See also Sykes*, 433 U.S. at 94 n.1 (Stevens, J., concurring) (also citing *Green*). Respondent's reliance on *United States ex rel. Bolognese v. Brierly*, 412 F.2d 193 (3d Cir. 1969), *cert. denied*, 397 U.S. 942 (1970), for his statement that the defendant must be personally involved in the

3. The State Court Findings of Fact Support A Finding That Defense Counsel Made Intentional Strategic Decisions.

As a final reason for denying review, respondent urges that the state court findings of fact are defective and do not warrant a conclusion that his defense attorneys acted intentionally for strategic reasons. Brf. in Opp. at 9-14. That contention, however, is unavailing for four reasons. *First*, under unequivocal circuit precedent,[3] respondent was required to make that contention in the first instance in the district court. Though represented by present counsel, respondent remained silent on the issue, and his complaint now should be disregarded. *Second*, the applicability of 28 U.S.C. §2254(d) was not decided by the court of appeals, and the resolution of any section 2254(d) question was not necessary to that court's rejection, as a matter of law, of the deliberate bypass principle. Pet. App. at 14-16 & n.6.[4] *Third*, the emphasis of both the court of appeals and respondent upon the supposed ambiguity

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decision is misplaced, the waiver in that case being of the right to appeal, a decision in which the defendant must participate.

[3] *Reese v. Fulcomer*, 946 F.2d 247, 254-55, 256 n.4 (3d Cir. 1991), *cert. denied*, 112 S.Ct. 1679 (1992); *United States ex rel. Henderson v. Brierly*, 468 F.2d 1193, 1195 (3d Cir. 1972).

[4] The court of appeals observed that the evidence was sufficient to support any finding that strategic decisions were made. Pet. App. at 14. *See* Pet. App. at 29, 38-39 (dissenting opinion). The court had also noted in its 1988 decision that the motives for the actions of respondent's attorneys had been fully explored in the state court hearings. *Reynolds v. Ellingsworth*, 843 F.2d 712, 723 (3d Cir.), *cert. denied*, 488 U.S. 960 (1988).

in the decision of the Superior Court[5] is myopic. The state supreme court clearly decided that respondent's attorneys had made intentional strategic decisions not to press the claim. Pet. App. at 91-92. That finding, irrespective of any confusion experienced by the court of appeals and respondent, is without question presumptively correct under section 2254(d). *Sumner v. Mata*, 449 U.S. 539, 545-47 (1981). *Fourth*, the reading of the Superior Court decision urged by respondent, focusing upon the language of paragraph 4 of the decision (Pet. App. at 89), would make the preceding paragraph of the order totally superfluous. *See also Coleman*, 501 U.S. at 744 (state court's " 'consideration' of all filed papers adds some ambiguity, but we simply cannot read it as overriding the court's explicit grant of a dismissal motion based solely on procedural grounds"). The state judge may have awkwardly quoted this Court's decision in *Engle v. Isaac*, 456 U.S. 107 (1982), but the federal courts' habeas jurisdiction does not establish a manual of judicial opinion writing for state judges. *Coleman*, 501 U.S. at 739; *Wainwright v. Witt*, 469 U.S. 412, 430 (1985); *Harris v. Rivera*, 454 U.S. 339, 344-45 & n.9 (1981); *Sumner*, 449 U.S. at 548. In short, none of the reasons articulated by respondent are sufficient to reject the state courts' findings – findings in which the district court not once, but twice concurred – that respondent's defense counsel made intentional strategic decisions not to present the due process claim.

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[5] Pet. App. at 12, 15; Brf. in Opp. at 8, 14.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES M. OBERLY, III
Attorney General of the
State of Delaware

RICHARD E. FAIRBANKS, JR.
Chief of Appeals Division

LOREN C. MEYERS
Deputy Attorney General
Counsel of Record

Delaware Department of Justice
820 N. French Street
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(302) 577-2500

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